

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>EDDIE MASSEY</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>DAVID KOELZER TRUCKING</b>	)	
and	)	
<b>MIDWEST PMS</b>	)	
Respondents	)	Docket No. <b>228,287</b>
	)	
AND	)	
	)	
<b>FEDERATED MUTUAL INS. CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant appealed Administrative Law Judge Pamela J. Fuller's award dated August 29, 2000. The Board heard oral argument on February 9, 2001.

**APPEARANCES**

Claimant appeared by his attorney, Diane F. Barger. Respondents and their insurance carrier appeared by their attorney, D. Shane Bangerter.

**RECORD & STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

The issues raised on review by the claimant include nature and extent of disability; average weekly wage; payment of Dr. Cullum's medical bills as authorized medical; and payment of unauthorized and future medical.

The respondent raised no additional issues and contends the Administrative Law Judge's decision should be affirmed.

### **FINDINGS OF FACT & CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, including the stipulations of the parties, the Board makes the following findings of fact and conclusions of law:

Claimant was employed as a truck driver for the respondent, David Koelzer Trucking. He was required to drive a truck to a plant in Woodward, Oklahoma where the truck was loaded with urea, a liquid cattle feed supplement, and then he would drive to Garden City to unload at the respondent's plant.

On April 23, 1997, in the process of unloading the truck, the claimant was exposed to ammonia as he attempted to attach a hose from a tank to his truck in order to unload. The claimant became short of breath and noticed an erratic heart beat. The claimant went outside for fresh air on several occasions before the truck was finally unloaded. After the truck was unloaded, the claimant went home and called his employer, Mr. Koelzer, to advise him about the ammonia exposure incident.

The claimant then called the emergency room at the hospital in Satanta and was advised to report to the hospital. When he advised emergency room personnel that he could not go to the hospital because he was uninsured, he was referred to the poison control unit and advised to take a shower.

The next morning the claimant was still having difficulty breathing and his heart rate was erratic. He went to see Dr. Harris and upon cursory examination was taken to the hospital where testing confirmed he was having atrial fibrillation. Atrial fibrillation is the chaotic irregular rhythm of the heart that originates in the top part of the heart and predisposes people to strokes. Pulmonary function tests were performed and the following day the claimant's heart rate returned to normal. Claimant was released from the hospital and returned to work on April 28, 1997.

The claimant sought treatment from Dr. Cullum, a chiropractor. The claimant had been advised by a friend that Dr. Cullum could treat high blood pressure. The claimant saw Dr. Cullum on May 6, 1997, and began a treatment regimen of herbal remedies, homeopathic medicine as well as chiropractic manipulation. Dr. Cullum eventually took claimant off work because of his ongoing symptomatology.

The claimant described symptoms consisting of problems with his breathing, his kidneys would cramp, vision loss, nausea, headaches, an erratic heart beat, and instances of the left side of his body going numb. The claimant sought additional treatment with a pulmonary specialist and following a preliminary hearing, Brian M. Gross, M.D. was ordered to provide treatment.

Dr. Gross, a specialist in pulmonary disease, examined the claimant on January 8, 1998. Dr. Gross initially concluded that the ammonia exposure caused the atrial fibrillation. However, the doctor felt that some additional testing should be done to determine whether there was a connection between the exposure and the claimant's ongoing symptoms.

Dr. Gross ordered that the claimant undergo two periods of 24-hour Holter monitoring. Holter monitoring is a heart monitor that takes a continuous recording of the heart rhythm for subsequent review for irregularities or arrhythmias. The results of the Holter monitoring showed no atrial fibrillation. The monitoring did reveal claimant had a rare isolated premature ventricular beat, some infrequent premature atrial beats and had what was described as a rare three to five beat episode of asymptomatic supraventricular tachycardia. Dr. Gross concluded those abnormalities were not related to claimant's symptoms.

The doctor also had pulmonary function tests conducted. The pulmonary function tests depend on maximal effort and cooperation and Dr. Gross noted that the test results did not confirm that such an effort was obtained from the claimant.

On March 17, 1998, Dr. Gross opined the claimant had reached maximum medical improvement as a result of the ammonia exposure incident. He further stated he did not see any permanent impairment as a result of that incident because the Holter monitoring was negative for any evidence of ongoing atrial fibrillation and his x-rays were normal. The doctor concluded the claimant did not need any additional care. The doctor noted that the claimant had hypertension, unrelated to the ammonia incident, and recommended claimant stop taking vitamin supplements and seek treatment from a physician for his blood pressure.

The claimant then sought treatment on his own with Dr. Osborn, a cardiologist. Dr. Osborn first examined the claimant on May 28, 1998. The claimant complained of shortness of breath, chest pain, left facial, neck, arm and upper chest numbness and described the onset of those symptoms following his exposure to ammonia. At the initial exam, Dr. Osborn diagnosed the claimant with paroxysmal atrial fibrillation. The doctor started the claimant on beta blockers to stabilize the heart rhythm. Dr. Osborn opined that claimant's continued complaints were causally related to the ammonia exposure.

The claimant requested the treatment with Dr. Osborn be authorized. After a preliminary hearing, the Administrative Law Judge referred the claimant for an independent medical examination pursuant to K.S.A. 44-516. Ultimately, the claimant was referred to James E. Davia, M.D., in Overland Park, Kansas.

Dr. Davia conducted claimant's examination and reviewed his prior medical records. Dr. Davia opined that the timing of the onset of the patient's rapid palpitations shortly after he was exposed to ammonia suggests a causal relationship between the ammonia exposure and the heart rhythm abnormality. It was the doctor's opinion that the acute exposure to ammonia was enough to trigger the atrial fibrillation secondary to a reflex

mechanism. The doctor thought it was important to note that the atrial fibrillation was transient because it disappeared the day after admission to the hospital.

Addressing the question of whether any subsequent episodes of atrial fibrillation the claimant might have had would be related to the ammonia exposure, the doctor stated that exposure to ammonia gas does not cause permanent injury to any portion of the heart and it is not known to be a cause of repeated episodes of atrial fibrillation or any other heart rhythm abnormality.

The Administrative Law Judge adopted the opinions of Drs. Gross and Davia and determined that the claimant sustained a temporary injury but suffers no permanent impairment as a result of his accidental injury on April 23, 1997.

### **Admissibility of Dr. Davia's Report**

In response to a question at oral argument, the claimant raised, for the first time, an objection to the inclusion of Dr. Davia's report in the evidentiary record. Because Dr. Davia was not deposed and the parties did not stipulate the report was part of the record, the claimant contends the report cannot be considered. After the hearing before the Board, the claimant filed an additional brief contending that K.S.A. 44-516 and K.A.R. 51-9-6 preclude consideration of the report without the supporting testimony of the physician.

Initially, it should be noted the claimant made no contemporaneous objection to the Administrative Law Judge during the litigation of this matter regarding admission and inclusion of Dr. Davia's report as part of the record. Moreover, consideration of the report was not listed as an issue in the application for review, nor argued in claimant's brief to the Board. Nevertheless, because there is the possibility of further appeal, we will address the merits of the claimant's objection.

The Administrative Law Judge's order appointing Dr. Davia as an independent medical examiner was entered pursuant to K.S.A. 44-516 (Furse 1993) which states:

In case of a dispute as to the injury, the director, in the director's discretion, or upon request of either party, may employ one or more neutral health care providers, not exceeding three in number, who shall be of good standing and ability. The health care providers shall make such examinations of the injured employee as the director may direct.

K.A.R. 51-9-6 states:

If a neutral physician is appointed, the written report of that neutral physician shall be made a part of the record of hearing. Either party may cross-examine each neutral physician so employed. The fee of the neutral

physician giving such testimony shall be assessed as costs to a party at the administrative law judge's discretion.

K.S.A. 44-519 states:

No report of any examination of any employee by a health care provider, as provided for in the workers compensation act and no certificate issued or given by the health care provider making such examination, shall be competent evidence in any proceeding for the determination or collection of compensation unless supported by the testimony of such health care provider, if this testimony is admissible, and shall not be competent evidence in any case where testimony of such health care provider is not admissible.

Pursuant to K.S.A. 77-415(4), a regulation has the force of law. There is, however, a conflict between K.A.R. 51-9-6 and K.S.A. 44-519. The administrative regulation allows the report of a neutral physician to be made a part of the record of hearing. When a regulation is in conflict with a statute, the statute must be followed and the regulation disregarded. *Lakeview Village, Inc., v. Board of Johnson County Comm'rs*, 232 Kan. 711, 659 P.2d 187 (1982). This statutory conflict has also been addressed by the Kansas Court of Appeals on several occasions. The Court of Appeals has ruled that K.S.A. 1996 Supp. 44-510e(a) creates "a narrow exception to the general rules of K.S.A. 44-519." *Sims v. Frito Lay, Inc.*, 23 Kan. App.2d 591, 933 P.2d 161 (1997); see also *McKinney v. General Motors Corp.*, 22 Kan. App.2d 768, 921 P.2d 257 (1996). The Board has also addressed this conflict, not only in the context of K.S.A. 1996 Supp. 44-510e, but also in dealing with K.S.A. 44-516. The Board found little distinction between a report generated under K.S.A. 1996 Supp. 44-510e and one generated pursuant to K.S.A. 44-516. In applying the *Sims* and *McKinney* logic, the Board allowed the independent medical examination report to be admitted without the physician's testimony.

Herein, the ordered independent medical examination was made pursuant to K.S.A. 44-516 (Furse 1993) and pursuant to the version in effect on the date of accident, that statute did not provide for the report to be considered by the Administrative Law Judge without the testimony of the physician. However, the 2000 Legislature amended K.S.A. 44-516 to add the following sentence to the statute: "The report of any such health care provider shall be considered by the administrative law judge in making the final determination."

If a statutory amendment is considered procedural, it generally applies retroactively. If, on the other hand, the amendment is substantive, then the law in effect at the time of the injury governs the rights and obligations of the parties. *Osborn v. Electric Corp. of Kansas City*, 23 Kan. App.2d 868, 936 P.2d 297, *rev. denied* 262 Kan. 962 (1997). An amendment is considered procedural when it concerns the manner and order of conducting lawsuits--the mode of proceeding to enforce legally recognized rights.

Substantive amendments establish rights and duties of parties. *Rios v. Board of Public Utilities of Kansas City*, 256 Kan. 184, 191, 883 P.2d 1177 (1994).

The amendment in this case merely mandates the health care provider's report to be made a part of the record without changing the rights or obligations of the parties. The amendment is procedural and, thus, applies retroactively to this case.

This view is bolstered by considering the history of K.S.A. 44-516. In 1968, the Kansas Supreme Court decided *Garrigues v. Fluor Corporation, Ltd.* 201 Kan. 156, 439 P.2d 111 (1968). At that time, K.S.A. 44-516 did not permit an administrative law judge, on his or her own motion, to appoint a neutral health care provider. See L. 1957, ch. 293, § 3. In its decision, the court noted that the statute had been amended in 1927 and 1957, and in neither instance did the legislature provide for the selection of a neutral doctor on the director's (ALJ's) own motion. 201 Kan. at 159.

The following year, K.S.A. 44-516 was amended to allow the finder of fact to employ a neutral health care provider on its own motion. See L. 1969, ch. 246, § 2. If the legislature believed there was a need to allow the administrative law judge to employ a neutral health care provider, the legislature certainly contemplated that the administrative law judge would consider the doctor's findings. Under claimant's interpretation of K.S.A. 44-516, the administrative law judge would be wasting his or her time in procuring a neutral report which the administrative law judge could not read unless the parties decided to depose the expert.

The Board concludes the medical report prepared by the independent medical examiner, Dr. Davia, was properly considered by the Administrative Law Judge and is part of the evidentiary record.

### **Nature and Extent**

The Administrative Law Judge determined that the claimant sustained a temporary injury as a result of his work-related injury but suffered no permanent impairment. Claimant contends that the decision ignores the claimant's continued complaints and the testimony of the treating cardiologist.

The testimony of the two cardiologists, Drs. Osborn and Davia, were contradictory regarding the cause of any additional episodes of erratic heart rate the claimant has suffered since the accident. Both doctors reviewed the claimant's prior medical records and reached different conclusions regarding the effect that prior medical history had on the claimant's current symptoms.

Upon examining the claimant, Dr. Osborn had echocardiograms performed. The 2D echo findings showed the claimant had a left atrial enlargement, a right atrial

enlargement and a left ventricular enlargement. However, Dr. Osborn stated the M mode echo findings were more accurate and did not show any chamber enlargement.

Dr. Osborn reviewed the medical records from claimant's prior episode of heart problems in 1994 and concluded the diagnosis of hypertension made at that time did not coincide with the objective findings. After determining that claimant was previously misdiagnosed, the doctor concluded that the only causative factor for any current complaints of irregular heartbeat would be the ammonia exposure incident.

Although Dr. Osborn disagreed with the diagnosis resulting from the claimant's heart catheterization in 1994, he agreed the claimant had documented heart disease in 1994 and that atrial fibrillation can occur for no determinable cause. Perhaps most significantly, the doctor based his determination of causation solely upon the fact that the atrial fibrillation was temporally, or time related, to the ammonia exposure. In other words, there was an objective finding of atrial fibrillation on the EKG performed at the hospital the day after the ammonia incident. In addition, Dr. Osborn considered the Holter monitor readings an objective finding, however, he noted claimant had normal heart rates at each examination and there were no other objective findings of fibrillation.

Initially, Dr. Davia stated that without documentary evidence on electrocardiograph recordings it is impossible for any physician or cardiologist to state with any reasonable degree of certainty that the patient is actually having this type of heart rhythm abnormality. In addition, Dr. Davia noted that the Holter monitor showed two brief episodes of atrial fibrillation each lasting no more than a few seconds which were not associated with any symptoms of palpitations. He further noted that when the claimant did complain of palpitations during the Holter monitor recording, there were no atrial fibrillation or any other heart rhythm abnormalities present.

Dr. Davia specifically stated that exposure to ammonia gas does not cause permanent injury to any portion of the heart and it is not known to be a cause of repeated episodes of atrial fibrillation or any other heart rhythm abnormality.

Dr. Davia concluded that any subsequent episodes of atrial fibrillation that the claimant might have had, and the doctor specifically noted there had been no significant episodes documented, would not be related to the ammonia exposure. The doctor stated any subsequent episodes could be explained on the basis of the claimant's enlarged upper chambers of the heart which is a problem that has no relationship whatsoever to the ammonia exposure. Dr. Davia stated there was neither permanent damage nor long lasting effects to the claimant's heart as a result of the ammonia exposure. And any of claimant's symptoms that could conceivably be considered cardiac would not be causally related to such ammonia exposure. Lastly, the doctor opined there was no evidence to indicate the ammonia exposure exacerbated claimant's previously existing coronary artery disease in any way.

The Board finds more persuasive the opinion expressed by Dr. Davia, the court ordered independent medical examiner, and concludes that as a result of his work-related accident the claimant did not sustain any permanent impairment. The Administrative Law Judge's findings in this respect are adopted and affirmed.

### **Payment of Dr. Cullum's Bill**

The claimant seeks payment of Dr. Cullum's medical bill as authorized medical treatment. The claimant testified that when advised at the hospital that his high blood pressure was not caused by the ammonia he decided to get a second opinion. Some friends advised claimant that Dr. Cullum had treated their blood pressure problems so claimant sought treatment with Dr. Cullum.

Both claimant and Dr. Cullum testified that treatment with Dr. Cullum had been authorized by Jim Novachek, safety engineer for respondent Midwest PMS. This testimony is refuted by Mr. Novachek, who recalled his conversation with Dr. Cullum, wherein he advised the doctor that the claims department would have to make the determination whether treatment was authorized. Mr. Novachek gave the doctor the name and number of the person in the claims department to call. This testimony is corroborated by Mr. Novachek's contemporaneous handwritten notes regarding the conversation. Dr. Cullum testified it was his understanding that he was authorized to treat claimant. However, the doctor agreed Mr. Novachek never stated that he would pay the bill, nor did he state that he had authority to act on the insurance carrier's behalf. Dr. Cullum admitted that he had no written authorization from the employer or carrier to treat the claimant and that he saw the claimant on referral from another patient. Lastly, even claimant testified that he assumed the doctor was not authorized by the insurance carrier.

The facts demonstrate that the treatment from Dr. Cullum was obtained by the claimant on a self-referral for a second opinion. Accordingly, the Administrative Law Judge's decision denying payment of the bill as authorized medical treatment is affirmed.

### **Average Weekly Wage**

The claimant's application for review listed the claimant's average weekly wage as an issue. This issue was neither briefed nor argued before the Board. The claimant was paid on a per load basis and the Administrative Law Judge calculated the gross average weekly wage pursuant to K.S.A. 44-511(b)(5) (Furse 1993). Upon a review of the entire evidentiary record, the Administrative Law Judge's findings and conclusions that the claimant's average weekly wage was \$249.86 is adopted and affirmed in all respects.

### **Future Medical**



Because the work-related accident resulted in a temporary condition with no permanent impairment, the Administrative Law Judge's finding that claimant is not entitled to future medical treatment is affirmed.

**Unauthorized Medical**

The Administrative Law Judge's determination that the claimant is entitled to unauthorized medical expenses up to the statutory maximum is affirmed.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated August 29, 2000, is hereby affirmed in all respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of May 2001.

\_\_\_\_\_  
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

pc: Diane F. Barger, Claimant's Attorney, Wichita, Kansas  
D. Shane Bangerter, Respondent's Attorney, Dodge City, Kansas  
Pamela J. Fuller, Administrative Law Judge  
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